WEARABLE TECHNOLOGY AND EMPLOYER WELLNESS PROGRAMS: GAPS AND SOLUTIONS

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I. INTRODUCTION

As John F. Kennedy said in his address at the Assembly Hall at the Paulskirche in Frankfurt, "[c]hange is the law of life. And those who look only to the past are certain to miss the future."[1] Although Kennedy's quote comes from 1963, it aptly captures current challenges businesses face in addressing evolving wearable technology ubiquitous in today's society. As wearable technology becomes increasingly popular, businesses must balance the benefits and risks of implementing such technology in the workplace. In addition, it is imperative that the law step in to provide a framework to balance these benefits and risks.

As this note will discuss, there are gaps in the current laws relevant to wearable technology that can be fixed by extending HIPAA's coverage.[2] Also, this note addresses the current determination by the court in *AARP v. United States Equal Employment Opportunity Commission* that the EEOC must reconsider the level of incentive that is permitted to be placed on participation in employee wellness programs.[3] This note will start with an overview of wearable technology and its rise in prominence, followed by the benefits and risks related to its use. The note then proceeds to discuss current laws related to wearable technology and employment wellness programs, concluding with a suggested extension of the law. Also, a possible solution is advanced to avoid an arbitrary rule regulating incentives on employer wellness programs.

II. WHAT IS WEARABLE TECHNOLOGY?

Wearable technology may be defined as "a category of technology devices that can be worn by a consumer and often include tracking

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[1] Papers of John F. Kennedy. President's Office Files. Speech Files. Address in the Assembly Hall at the Paulskirche, Frankfurt, 25 June 1963.

[2] HIPAA, short for The Health Insurance Portability and Accountability Act of 1996, is legislation enacted in order to safeguard personal information and data collected and stored in medical records.

[3] AARP v. United States EEOC, 267 F. Supp. 3d 14, 19 (D.D.C. 2017).

information related to health and fitness."[4] Included in this term are a myriad of devices such as smart watches, fitness trackers, head-mounted displays, smart clothing, smart jewelry, and implantables.[5] While many people are aware of the capabilities of fitness trackers and smart watches, wearable technology applications run much further. For example, in the future it may be possible to combine smart glasses with police databases and facial recognition software.[6] However, this technology, while useful, may implicate public privacy issues. Nevertheless, the technology progresses. The market for wearable technology is expected to grow.[7] Vendors are projected to ship 125.5 million wearable devices in 2017, which is an increase of 20.4% from 2016.[8] The market for wearables is projected to include 240.1 million units shipped in 2021.[9] As the market for these products grows, businesses are faced with new issues.

Today, employers are starting to take advantage of this technology, with hopes of increasing productivity and decreasing the bottom line. One way employers are using this new technology is through wellness programs, which *inter alia*, seek to lower health risks and improve health outcomes. According to an article published in the Southwester Law Review,"[w]ellness programs have been defined as any program designed to promote health or prevent disease."[10] In a Willis survey, 68% of participating organizations were found to have had some type of wellness program.[11] In a different study, it was found that around 40-50% of employers with wellness programs use trackers.[12]

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[4] Vangie Beal, w*earable technology*, WEBOPEDIA, http://www.webopedia.com/TERM/W/wearable_technology.html (last visited Jan. 16, 2018).

[5] Dan Sung, *What is wearable tech? Everything you need to know explained,* WAREABLE (Aug. 3, 2015), https://www.wareable.com/wearable-tech/what-is-wearable-tech-753.

[6] Andrew Sheehy, *8 Mind-blowing Uses of Wearable Technology (Seriously…),* FUTURESTRUCTURE (Mar. 6, 2014), http://www.govtech.com/fs/news/8-Mind-blowing-Uses-of-Wearable-Technology-Seriously.html.

[7] *Worldwide Wearables Market to Nearly Double by 2021, According to IDC,* IDC (June 21, 2017), https://www.idc.com/getdoc.jsp?containerId=prUS42818517.

[8] *Id.*

[9] *Id.*

[10] Ann Hendrix & Josh Buck, *Employer-Sponsored Wellness Programs: Should Your Employer Be The Boss Of More Than Your Work?,* 38 SW. L. REV. 465, 468 (2009).

[11] WILLIS, THE WILLIS HEALTH AND PRODUCTIVITY SURVEY REPORT 1 (Apr. 2, 2014), https://www.willis.com/documents/publications/Services/Employee_Benefits/FOCUS_2014/20140402_50074_HCP_Health_Prod_FINAL_V2.pdf.

[12] Patience Haggin, *As Wearables in Workplace Spread, So Do Legal Concerns,* WALL STREET J. (ONLINE) (March 13, 2016), https://www.wsj.com/articles/as-wearables-in-workplace-spread-so-do-legal-concerns-1457921550.

Similar technology also found its way into the workplace through bring your own device (BYOD) company policies which allow employees to bring their personal devices, such as laptops, tablets, and smart phones, to work. Although these devices and their related health/fitness apps are related to the discussion, this note will focus on wearable technology, particularly in the fitness tracking area.

III. BENEFITS TO EMPLOYERS

As one might imagine, wearable technology has a lot of potential to increase efficiency in the workplace, while lowering costs. Some of the possible benefits include: increase in productivity, decrease in health-care costs, and access to valuable data.

With respect to productivity, the Willis survey found that "organizations are broadening their focus on the health and productivity of their workforce."[13] Another study, conducted by Goldsmiths, University of London, found that wearable technology has the potential to boost employee productivity and job satisfaction by 8.5% and 3.5%, respectively.[14] Dr. Chris Brauer, who was involved in the study, explained that "these results show organisations and employees need now to be developing and implementing strategies for introducing and harnessing the power of wearables in the workplace."[15]

Implementing this technology may also lower health-care costs. Employers may be able to take advantage of insurance companies' discounts or negotiate with their insurer to decrease costs. For example, Chris Barbin, CEO of Appirio, successfully negotiated with his company's insurer to reduce insurance costs by $280,000 by agreeing to share employee health data which indicated that employees' health was improving.[16]

This is significant as a majority of employees receive health insurance from their employer.[17] Additionally, insurance costs are pricey. For

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[13] WILLIS, *supra* note 9 at 1.
[14] Lori Sandoval, *Wearable technology can boost employee productivity, job satisfaction: Study*, TECH TIMES (May 3, 2014), http://www.techtimes.com/articles/6396/20140503/wearable-technology-can-boost-employee-productivity-job-satisfaction-study.htm.
[15] *Id.*
[16] Jonah Comstock, *Employer gets $280k insurance discount for using Fitbits*, MOBI HEALTH NEWS (Jul. 15, 2014), http://www.mobihealthnews.com/34847/employer-gets-280k-insurance-discount-for-using-fitbits.
[17] *Number of Americans Obtaining Health Insurance Through an Employer Declines Steadily Since 2000,* ROBERT WOOD JOHNSON FOUND. (Apr. 11, 2013), http://www.rwjf.org/en/library/articles-and-news/2013/04/number-of-americans-

example, in 2015, average annual premiums for employer-sponsored health insurance were $6,251 for single coverage and $17,545 for family coverage.[18] The Willis study also found that 61% of participating organizations "identified employees' health habits as the primary challenge in controlling health care costs."[19]

Some insurance companies have started giving rewards for employees who are active. For example, UnitedHealthCare Motion offers employees up to $1,460 per year for meeting specific goals.[20] Under its program, discounts are offered based upon meeting frequency, intensity, and tenacity ("FIT") goals.[21] According to its website, participants are eligible to get $1.50 off per day for meeting their frequency goal, which is 500 steps in 7 minutes.[22] They are also able to get $1.25 off per day under their intensity goal, or 3,000 steps in 30 minutes.[23] Lastly, they can receive a $1.25 off per day discount for the tenacity goal, 10,000 steps in one day.[24] Thus, under the program, employees stand to gain substantial benefits by participating.

Another benefit of wearable technology is that it can produce valuable information to employers. According to Dr. Chris Brauer, this technology helps employers understand what employees actually do at work.[25] This technology may also prove valuable in specialized settings. For example, a 2014 PWC report highlights that the manufacturing industry may benefit from expedited production via hands-free guidance tools.[26] Also, service industries may be able to "speed access to information in real time and enable seamless action."[27] In the medical context, wearable technology

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obtaining-health-insurance-through-an-employ.html (finding that 59.5% of Americans in 2011 obtained health insurance through employers); *See also* Frederic Blavin, Adele Shartzer, Sharon K. Long, and John Holahan, *Employer-Sponsored Insurance Stays Strong, with No Signs of Decay under the ACA: Findings through March 2016*, URBAN INST. (July 13, 2016), http://hrms.urban.org/briefs/employer-sponsored-insurance-aca-march-2016.html.

[18] *2015 Employer Health Benefits Survey*, KAISER FAM. FOUND. (Sep. 22, 2015), https://www.kff.org/report-section/ehbs-2015-section-one-cost-of-health-insurance/.

[19] WILLIS, *supra* note 9 at 1.

[20] *UnitedHealthCare Motion,* UNITED HEALTHCARE, https://www.uhc.com/individual-and-family/member-resources/health-care-tools/unitedhealthcare-motion (last visited Jan. 16, 2018).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Sandoval, *supra* note 12.

[26] PWC, THE WEARABLE FUTURE 4 (2014), https://www.pwc.com/us/en/technology/publications/assets/pwc-wearable-tech-design-oct-8th.pdf.

[27] *Id.*

has the potential to "improve accuracy of information, streamline procedures and increase clinical trials."[28] Thus, the potential for such benefits suggests that wearable technology will continue in its rise to prominence.

One example of wearable technology that has become increasingly popular is the Fitbit. While Fitbit sells to individuals, the company also markets to employers. Fitbit's website describes the device as technology that "motivates you to reach your health and fitness goals by tracking your activity, exercise, sleep, weight and more."[29] Fitbit CEO, James Park, proclaims that "the cost of a Fitbit device and the associated services is very small compared to savings from a healthier employee population."[30] According to Fitbit's website, over 70 of the Fortune 500 have implemented Fitbits in their corporate wellness programs.[31]

IV. RISKS TO EMPLOYERS AND EMPLOYEES

While there are many benefits associated with wearable technology in the workplace, there are also risks to employers regarding this technology. One risk to employers is the risk of information abuse. Employers could take the information they receive from employee participants and could potentially mine the aggregated data to provide a basis for hiring, firing and/or promotions. Employers may be encouraged to favor healthy employees while disfavoring unhealthy ones based on worries with respect to attendance, productivity, and health insurance costs. For example, imagine that an employer is hiring a new manager. Based on the data received from an employee's Fitbit, the employer may feel that a more active candidate is better suited to handle the job.

One current issue is that we may not be sure how this information can be used in the future. "Although a consumer may today use a fitness tracker solely for wellness-related purposes, the data gathered by the device could be used in the future to price health or life insurance or to infer the user's suitability for credit or employment."[32]

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[28] *Id.*
[29] FITBIT, https://www.fitbit.com/home (last visited Jan. 16, 2018).
[30] Tribune wire reports, *Target to offer health-tracking Fitbits to 335,000 employees,* CHICAGO TRIBUNE (Sept. 16, 2015), http://www.chicagotribune.com/bluesky/technology/ct-target-fitbit-20150916-story.html.
[31] FITBIT, https://healthsolutions.fitbit.com/aboutus/. (last visited May 1, 2018).
[32] FTC, FTC STAFF REPORT, INTERNET OF THINGS: PRIVACY & SECURITY IN A CONNECTED WORLD 16 (Jan. 2015), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf.

Another potential risk is that employees will not fully comprehend the extent to which data from these devices is being used. Although they may consent to wearing them, these devices may seem to be a mere fashion accessory, and thus, disclosure is important. Furthermore, data from these devices comes in the aggregate, thus giving users a false sense of hope that they may not be individually identified.

Security may also present another risk. One study found that most fitness trackers on the market leak data to a large audience who may or may not be able to manipulate the data.[33] The study found that, with the exception of the Apple Watch, "wearables emitted a unique Bluetooth identifier that allowed a third-party to track the device's movement over time if the device was not actively paired with another device."[34] Many of these devices are at risk of being compromised, as they generally do not have built-in security.[35] However, inherently, the data collected by wearable technology may not be as prone to hacking as other devices which contain more valuable information, such as financial data.

It is cautioned that employers do not make wellness programs with wearable technology. However, there is also a potential risk that in a voluntary program, employers may assume employees who do not participate in the program could have something to hide. Thus, this could provide another basis for discrimination with respect to hiring, firing, and promotion.

A. HIPAA

The Health Insurance Portability and Accountability Act ("HIPAA")[36], provides protection against disclosure of medical information.[37] According to the U.S. Department of Health & Human Services ("HHS"), "*The Standards for Privacy of Individually Identifiable Health Information* ("Privacy Rule") establishes, for the first time, a set of national standards for the protection of certain health information."[38] One

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[33] Aaron Sankin, *Every fitness tracker but Apple's is a privacy nightmare*, THE DAILY DOT, (Feb. 5, 2016) https://www.dailydot.com/layer8/fitness-trackers-open-effect-citizen-lab-report/.
[34] *Id.*
[35] James A. Martin, *10 things you need to know about the security risks of wearables,* CIO (Mar. 28, 2017), https://www.cio.com/article/3185946/wearable-technology/10-things-you-need-to-know-about-the-security-risks-of-wearables.html.
[36] The Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.
[37] *The HIPAA Privacy Rule,* OFFICE FOR CIVIL RIGHTS, https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html (last reviewed July, 26 2013).
[38] *Id.*

"major goal of the Privacy Rule is to assure that individuals' health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public's health and well being."[39] So why was this rule needed? As the HHS points out, before the Privacy Rule was passed, "personal health information could be distributed—without either notice or authorization—for reasons that had nothing to do with a patient's medical treatment."[40]

As an example, imagine that a health plan had information relating to a patient's past physical or mental health, as well as the past payment for the provision of health care for the patient. Before the Privacy Rule, and assuming no State or local law provided otherwise, a health plan could transmit this information to lenders or employers without the patient's permission.[41] In turn, this information could be used to "deny the patient's application for a home mortgage or a credit card, or to an employer who could use it in personnel decisions."[42] As seen by this example, health-related information has the potential to be abused by various parties. Thus, the Privacy Rule "establishes a Federal floor of safeguards to protect the confidentiality of medical information."[43]

Although Fitbits and related devices do collect health related information that pose similar concerns, HIPAA, as it is drafted, does not govern the collection of the type of data discussed in this note. HIPAA was written in 1996, before Fitbits and related products became popular. HIPAA applies to covered entities, which include: health plans, health care clearinghouses, and health care providers "who transmit any health information in electronic form in connection with a transaction covered by this subchapter."[44] Thus, employers that do not fall under this definition are not subject to HIPAA.

In addition, the information subject to HIPAA is "individually identifiable health information."[45] Individually identifiable health information is defined as

> a subset of health information, including demographic information collected from an individual, and: (1) is created

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[39] *Id.*
[40] *The HIPAA Privacy Rule,* OFFICE FOR CIVIL RIGHTS, *The HIPAA Privacy Rule,* OFFICE FOR CIVIL RIGHTS, https://www.hhs.gov/hipaa/for-professionals/faq/188/why-is-the-privacy-rule-needed/index.html (last reviewed July, 26 2013).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] 45 C.F.R. § 160.102(a)(3) (2017).
[45] 45 C.F.R. § 160.103 (2017).

> or received by a health care provider, health plan, employer, or health care clearinghouse; and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (i) that identifies the individual; or (ii) with respect to which there is a reasonable basis to believe the information can be used to identify the individual. [46]

In the case of wearable technology in the workplace, the information collected also may not fall under the definition of individually identifiable health information. According to Fitibit's privacy policy, they ask for information like height and weight and collect data like number of steps you take to show your stats and progress, and use personal information like height, weight, gender and age to be more accurate about the stats your device is tracking.[47] Fitibit also uses de-identified data (data that does not identify you personally) to share general information about activities.[48] Fitibit "may share or sell aggregated, de-identified data that does not identify you, with partners and the public in a variety of ways, such as by providing research or reports about health and fitness or as part of our Premium membership."[49]

Data from Fitbits may also be shared when you link a Fitbit account to a third-party app, such as Facebook or Twitter, or when a participant elects "to share data with your employer as part of a wellness program."[50] Once data is shared with an employee wellness program, information is governed by the company's privacy policies and terms. Thus, a mandatory wellness program would give employers access to data collected by these devices. It should also be noted that participants have the ability to revoke their consent to share with third-parties by going to their account settings.[51]

HIPAA also "provides no private right of action, and enforcement of HIPAA is reserved exclusively to the Secretary of Health and Human Services."[52] Thus, even if HIPAA were extended to employers' use of data, an individual could not bring a lawsuit, and would have to rely on enforcement by the Secretary of Health and Human Services.

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[46] *Id.*
[47] FITBIT, https://www.fitbit.com/legal/previous-privacy-policy/08092016 (last visited Jan. 16, 2018).
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] Rzayeva v. United States, 492 F.Supp.2d 60, 83 (D. Conn. 2007).

On its face, the Privacy Rule seems to address some of the same concerns presented by employers' use of data collected from wearable technology. As previously stated, the concern is that employers will be able to collect health data from devices such as Fitbit's, and in turn, use this data in a way that employees neither understand nor consent to.

B. Suggestions

As previously mentioned, one possible solution to this problem is to extend HIPAA's coverage. This has the added advantage of efficiency, as a whole new statute is not required to close the gaps in the current law. This could be achieved in two steps. First, the definition of "covered entities" could be amended to include manufacturers of wearable technology, as well as software developers who handle the health information collected from wearable technology. If this language were included, the manufacturers and software developers would be required to comply with HIPAA's privacy restrictions. In step two, the definition of "individually identifiable information" could also be extended to include information received from wearable technology.

V. VOLUNTARY PARTICIPATION

Another legal issue relates to when participation in a corporate wellness program is considered voluntary, thus entitling employers access to sensitive employee health information.

In *AARP v. United States EEOC*, the court granted AARP's motion for summary judgment related to their challenge of two regulations promulgated by the U.S. Equal Employment Opportunity Commission (EEOC) regarding the incentives allowed under employer-sponsored wellness programs.[53] However, as the court feared that vacating the regulations would result in "significant disruptive consequences," the court remanded the rules to the EEOC for reconsideration.[54] Thus, the legal issue faced by the EEOC relates to what level of incentives employers may offer in exchange for participation in an employer-sponsored wellness program.

Because employee wellness plans often collect sensitive medical information, the nondiscrimination provisions of the ADA and GINA are implicated. According to the EEOC, a wellness program "generally refers to health promotion and disease prevention programs and activities offered to employees as part of an employer-sponsored group health plan or separately

[53] AARP v. United States EEOC, 267 F. Supp. 3d 14, 19 (D.D.C. 2017).
[54] *Id.* at 38-9.

as a benefit of employment."[55] Furthermore, under these programs employees may be asked "to answer questions on a health risk assessment (HRA), and/or undergo biometric screenings for risk factors (such as high blood pressure or cholesterol)."[56] Also, corporate wellness programs may "provide educational health-related information or programs that may include nutrition classes, weight loss and smoking cessation programs, onsite exercise facilities, and/or coaching to help employees meet health goals."[57]

The EEOC administers the ADA and GINA, and thus, is tasked with reconciling "the tension that exists between the laudable goals behind such wellness programs, and the equally important interests promoted by the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA)."[58] Wellness programs are also regulated, in part, by the Health Insurance Portability and Accountability Act (HIPAA).[59] As wellness programs are governed by such a complex regulatory and statutory framework, some background of the underlying statutes will help frame the issue.

A. HIPAA/ACA

Under HIPAA, as amended by the Affordable Care Act (ACA), health plans and insurers, including plans offered through an employer, are prohibited from discriminating on the basis of "any health status related factor."[60] However, an exception is found where covered entities, including employers, offer "premium discounts or rebates modifying otherwise applicable copayments or deductibles in return for adherence to programs of health promotion and disease prevention."[61] In other words, wellness programs may carry incentives.

The ACA modified the nondiscrimination provision of HIPAA to provide a cap of 30% of the cost of coverage for participation in health-contingent wellness programs, where "rewards are offered when an

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[55] *EEOC's Final Rule on Employer Wellness Programs and Title I of the Americans with Disabilities* Act, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www1.eeoc.gov//laws/regulations/qanda-ada-wellness-final-rule.cfm?renderforprint=1 (last visited Jan. 18, 2018).
[56] *Id.*
[57] *Id.*
[58] *AARP,* 267 F. Supp. 3d at 19.
[59] The Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.
[60] 29 U.S.C. § 1182(b)(2)(B).
[61] *See* 29 U.S.C. § 1182(b)(2)(B); 26 U.S.C. § 9802(b); 42 U.S.C. § 300gg-4(b).

employee satisfies a standard related to a particular health factor."[62] The 30% cap does not apply to *participatory* wellness programs, which "are generally available without regard to an individual's health status."[63] The nondiscrimination provision only requires that these programs are available to all similarly situated individuals.[64] One of the listed examples is a program "that provides a reward for employees for attending a monthly, no-cost health education seminar." [65]

B. ADA

Under the ADA, employers are barred from requiring medical examinations or inquiring as to whether an individual has a disability unless the inquiry or examination is "job-related and consistent with business necessity."[66] "The purpose of the law is to make sure that people with disabilities have the same rights and opportunities as everyone else."[67] With respect to employee health programs, employers "may to conduct voluntary medical examinations, including voluntary medical histories."[68] However, "voluntary" is not defined in the statute.

C. GINA

GINA prohibits an employer from requesting, requiring, or purchasing genetic information of an employee or of an employee's family members.[69] Genetic information is comprised of "family health history, the results of genetic tests, the use of genetic counseling and other genetic services, and participation in genetic research."[70] Under the definition of "genetic information," the following information is protected: an individual's genetic tests, the genetic tests of family members (including spouses), and the manifestation of a disease or disorder of a family member.[71] This information "helps you know and understand health conditions that run in your family, as well as your risk for developing certain health conditions or

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[62] The Patient Protection and Affordable Care Act, 42 U.S.C. §18001 (2010); 78 Fed. Reg. 33158 at 33167 (June 3, 2013); AARP v. United States EEOC, 226 F. Supp. 3d 7, 12 (D.D.C. 2016).
[63] *HIPAA and the Affordable Care Act Wellness Program Requirements*, https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/caghipaaandaca.pdf (last visited Jan. 16, 2018).
[64] *Id.*
[65] *Id.*
[66] 42 U.S.C. § 12112(d)(4)(A).
[67] *What is the Americans with Disabilities Act (ADA)?*,ADA NATIONAL NETWORK, https://adata.org/learn-about-ada (last visited Jan. 16, 2018).
[68] 42 U.S.C. §12112(d)(4)(A).
[69] 42 U.S.C. § 2000ff-1(b).
[70] Genetic Information Nondiscrimination Act of 2008, H.R. 493, 110th Cong. § 101 (2008). http://www.ginahelp.org/GINAhelp.pdf (last visited Jan. 16, 2018).
[71] *See* 42 U.S.C § 2000ff(4)(A).

having a child with certain conditions."[72] However, there is an exception for employer wellness programs, provided that the information is "voluntary."[73] As in the ADA, "voluntary" is not defined anywhere in the statute.

D. The Court's Analysis

The court's analysis turns on the EEOC's interpretation of the meaning of "voluntary," and thus, the *Chevron* analysis is implicated.[74] According to the court, the EEOC chose to advance an interpretation of "voluntary" consistent with the definition "without valuable consideration."[75] AARP, the party challenging this interpretation, advanced another plausible definition namely that "voluntary" means "free from coercion."[76] As the ADA and GINA are ambiguous with respect to the definition of voluntary, and the possible interpretations advocated by both parties are possible under the statutes, the court characterizes this as a *Chevron* step two case.[77]

Pursuant to *Chevron* step two, the court is to defer to the agency's chosen interpretation of the meaning of "voluntary" if the agency has offered a reasoned explanation for its decision.[78] A court will not defer to an agency interpretation that is arbitrary, capricious, or manifestly contrary to the statute.[79] Thus, the EEOC is given broad judicial deference regarding their interpretation.

The EEOC offered three main reasons as to why their interpretation of "voluntary" should be accepted. Primarily, it argued that the interpretation attempted "to harmonize its regulations with the HIPAA regulations governing wellness programs and to induce more individuals to participate in wellness programs, as that was the goal expressed by Congress in the ACA."[80] While the court acknowledged that this "may be a reasonable goal[,]" the court found two problems with this argument.[81] The first problem, was that the 30% cap in HIPAA was chosen in a different context, as there is no "voluntary" requirement on wellness programs in HIPAA, and

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[72] *GINA Genetic Information Nondiscrimination Act,* http://www.ginahelp.org/GINAhelp.pdf (last visited Mar. 23, 2018).
[73] *Id.*
[74] AARP v. United States EEOC, 267 F. Supp. 3d 14 (D.D.C. 2017).
[75] *Id.* at 28.
[76] *Id.*
[77] *Id.*
[78] *See, e.g.,* Village of Barrington v. Surface Transp. Bd., 636 F.3d 650, 660 (D.C. Cir. 2011).
[79] AARP v. United States EEOC, 267 F.Supp.3d 14, 28 (D.D.C. 2017).
[80] *Id.* at 29.
[81] *Id.*

HIPAA is "intended to prevent insurance discrimination."[82] Under HIPAA, there is no limit on incentives that may be placed on participatory wellness programs, based on the nature of the programs, which do not require a particular health standard to be achieved, eliminating the risk of discrimination.[83]

In contrast, the ADA and GINA are "designed to prevent employers from forcing employees to disclose health information that might enable employers to discriminate against them."[84] Thus, based on these differences, the court concluded that the "EEOC does not appear to have considered the purpose of the ADA vis-à-vis HIPAA here."[85] The second issue the court found with EEOC's harmonization with HIPAA argument was that in reality, the regulations were not consistent.[86] Although the incentive number (30%) is the same for HIPAA, the ADA, and GINA, HIPAA makes a distinction based on participatory programs and health-contingent programs, while the ADA and GINA do not.[87] Furthermore, the calculations are different: HIPAA bases the incentive level on total cost of coverage, while the ADA and GINA calculate the incentive level based on the cost of self-only coverage.[88] The court also notes that, even if consistency were achieved, "the agency's failure to consider the fact that HIPAA contains no 'voluntary' requirement might be fatal to its chosen interpretation."[89]

Thus, in interpreting the court's analysis, it appears that the court finds that HIPAA, the ADA, and GINA serve different purposes, and contain different language, namely, the use of "voluntary." Thus, the EEOC may be required to find a new foundation upon which they can base their regulation.

A second argument that the EEOC advanced in favor of their interpretation was that current insurance rates rendered their interpretation of "voluntary" reasonable.[90] The court quickly dismissed this argument, finding it "to be utterly lacking in substance based on a review of the administrative record."[91]

Lastly, the EEOC argued that their interpretation of "voluntary" was reasonable based on an endorsement in comment letters submitted by the

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[82] *Id.* at 30.
[83] *Id.*
[84] *AARP,* 267 F.Supp. at 30.
[85] *Id.*
[86] *Id.* at 31
[87] *Id.*
[88] *Id.* at 32
[89] *AARP,* 267 F.Supp. at 31.
[90] *Id.* at 34
[91] *Id.* at 32.

American Heart Association.[92] The court also dismissed this argument, finding the letter to contain "largely conclusory statements and no analysis" and explained that "the agency must explain why it chose to rely on certain comments rather than others."[93] Thus, the court did not find the EEOC's three main arguments to be persuasive, and further found that the EEOC failed to consider relevant factors.[94] "For example, commentators pointed out that, based on the average annual cost of premiums in 2014, a 30% penalty for refusing to provide protected information would double the cost of health insurance for most employees."[95] The court was concerned that the ADA and GINA rule could disproportionately harm the group the rules are designed to protect, primarily those with disabilities, who on average have lower income.[96]

At this point, one might question the necessity of the rules promulgated by the EEOC. However, the court notes that "there is plenty of evidence to support EEOC's conclusion that regulation was needed in this area to clarify employer obligations with respect to wellness programs."[97] So why did the court reject the EEOC's rules for failing "to provide for a reasoned explanation?" The court openly acknowledged that "some arbitrary line drawing may be necessary in determining where to set the incentive level," but ultimately, determined the EEOC must "point to some evidence…that reasonably supports where it chose to draw the line, and it must also respond to 'substantial criticisms' of that choice."[98]

Given the court's rationale in rejecting the EEOC's rule-making process, it is likely the EEOC will look to either: (a) reduce the incentives permitted under the rules, (b) point to a more defensible explanation as to their "line-drawing" or, most likely, (c) both.[99] However, it is also possible the EEOC could appeal the ruling in the *AARP* case, which may cast further confusion to employers. This note, however, provides another possible regulation the EEOC could advance, which would preserve the benefits of wellness programs while respecting the purposes of the ADA and GINA.

VI. BENEFITS OF WELLNESS PROGRAMS

So, what are the benefits of an employer wellness program? According to a Rand Corporation study, "[e]mployers offer the programs to improve the health and well-being of their employees, increasing their

[92] *Id.*
[93] *Id.*
[94] *AARP,* 267 F.Supp. at 32.
[95] *Id.*
[96] *AARP,* 267 F.Supp.3d at 33.
[97] *Id.* at 34.
[98] *Id.*
[99] *AARP,* 267 F.Supp.3d.

productivity, reduce their risk of costly chronic diseases, and improve control of chronic conditions."[100] Included in this study, the author noted that "a 2010 review by a Harvard economist stated that wellness programs returned three dollars in health care savings and three dollars in reduced absenteeism cost for every dollar invested."[101] Thus, it is apparent that employer wellness programs provide a benefit for employers, and they have incentives to implement such programs.

According to Sharon K. Soldano, "[t]he primary business objective for workplace wellness programs is aimed at reducing health care costs," as "[h]ealth care costs have skyrocketed and are projected to account for 20% (one-fifth) of the US Gross Domestic Product by 2024 or $4.8 trillion.[102] Furthermore, the "costs associated with chronic disease account for more than 80% of total health care spending and approximately one-half of Americans have one or more chronic diseases."[103]

Another startling statistic found by the Centers for Disease Control and Prevention, "eighty-six percent of the nation's $2.7 trillion annual health care expenditures are for people with chronic and mental health conditions."[104]According to the CDC, it is possible to reduce these costs.[105] As these statistics demonstrate, chronic disease is a rising problem that has huge implications on the economy and on individuals' health.

Chronic diseases are "ongoing, generally incurable illnesses or conditions, such as heart disease, asthma, cancer, and diabetes. These diseases are often preventable, and frequently manageable through early detection, improved diet, exercise, and treatment therapy."[106] According to the Partnership to Fight Chronic Disease, the total cost of obesity to U.S. companies is estimated at $13 billion annually.[107] This definition "includes

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[100] *Do Workplace Wellness Programs Save Employers Money?,* RAND CORP. (2014)https://www.rand.org/content/dam/rand/pubs/research_briefs/RB9700/RB9744/RAND_RB974.4.pdf. The Rand Corporation is a nonprofit institution that provides research and analysis to improve policy and decision-making.
[101] *Id.*
[102] Sharon K. Soldano, *Workplace Wellness Programs to Promote Cancer* Prevention, 32 SEMINARS IN ONCOLOGY NURSING 281, 282 (2016).
[103] *Id.*
[104] *Chronic Diseases: The Leading Causes of Death and Disability in the United States*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/chronicdisease/overview/index.htm#ref17 (last updated June 28, 2017).
[105] *Id.*
[106] *The Growing Crisis of Chronic Disease in the United States*, PARTNERSHIP TO FIGHT CHRONIC DISEASE, http://www.fightchronicdisease.org/sites/default/files/docs/GrowingCrisisofChronicDiseaseintheUSfactsheet_81009.pdf (last visited Jan. 16, 2017).
[107] *Id.*

the 'extra cost' of health insurance ($8 billion), sick leave ($2.4 billion), life insurance ($1.8 billion), and disability insurance ($1 billion) associated with obesity."[108] These statistics demonstrate an opportunity to improve and cut down on some of these costs through improved diet, increased activity, and by decreasing the amount of smoking that occurs. Employer wellness programs are one example of a way employers can jump start lifestyle changes in employees, which could have an enormous impact on the battle against chronic disease.

According to the Centers for Disease Control and Prevention, in the year of 2015, "50% of adults aged 18 years or older did not meet recommendations for aerobic physical activity. In addition, 79% did not meet recommendations for both aerobic and muscle-strengthening activity."[109]

One way to reduce costs is through education. Education of a healthy lifestyle can come in many forms. One aim of corporate wellness programs is to educate employees and help them make healthy life choices. For example, "[c]ompanies implement programs such as group walking or 'lunch and learn' sessions; they hang posters reminding employees to make healthier choices; they hire counselors, coaches, and trainers to demonstrate the value of exercise, a healthy diet, managing stress or quitting smoking."[110] While these programs might be met with some resistance, Jay B. Rea, of the Corporate Wellness Magazine explains that "people need to understand the core reasons the change is good for them in the first place."[111] Wellness programs are a prime example of an opportunity to explain the positive benefits of change.

One of the current issues is that "[t]he decisions, habits and lifestyle choices which led to the health problems in the first place, have become very comfortable in the employee's life."[112] One way to overcome the "status quo" is to create a culture of wellness by "fostering a workplace that encourages and promotes the well-being of your employees."[113] If implemented correctly, employee wellness programs can help achieve this culture.

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[108] *Id.*
[109] *Supra* note 97.
[110] Jay B. Rea, *The Role of Education in Health and Wellness Programs*, CORPORATE WELLNESS MAGAZINE.COM, http://www.corporatewellnessmagazine.com/worksite-wellness/the-role-of-education-in-health/ (last visited Jan. 16, 2018).
[111] *Id.*
[112] *Id.*
[113] Alan Kohll, *How You Can Nurture A Culture of Wellness,* FORBES (Apr. 6, 2017), https://www.forbes.com/sites/alankohll/2017/04/06/how-you-can-nurture-a-culture-of-wellness/#30d7d9ad1525.

But what about the other side—what benefits are employees getting from these sorts of programs? Given rising health care costs and the exorbitant number of Americans who suffer from a chronic disease, it is apparent that a change needs to occur. Soldano also notes that "[i]t is well-established that poor lifestyle choices are significantly linked to the incidence of chronic disease," and "[t]he top four lifestyle choices (tobacco use, physical activity, nutrition, and stress) are attributed to 75% of all chronic diseases."[114]

The journal goes on to note that Johnson and Johnson (J & J) provides an example of a company who measured their wellness efforts. According to their data, "J & J realized an overall increase in the number of employees classified as low-risk (defined as 0 to 2 health risks) from 78% to 87.5% in the course of one 5-year period."[115] During the same time period, they reported reductions in the percentage of employees who were sedentary (from 39% to 21%), used tobacco (12% to 3.6%), had high blood pressure (14% to 6.4%) and high cholesterol (19% to 6.2%).[116] Based on this example, as well as others, "the evidence is clear that the benefits to employees who participate in workplace wellness programs are tangible."[117]

As previously noted, companies not only have incentives to take advantage of employer wellness programs, they *are* taking advantage of this opportunity. According to a Towers Watson survey, 94% of companies surveyed planned to implement a health and productivity plan within 3 years.[118] Thus, this increasingly popular topic may become more salient with time.

VII. VOLUNTARY OR COERCIVE

For analytical purposes, it may be helpful to separate the purpose of the ADA and GINA from the risks that the EEOC's regulations pose. As previously stated, the court in *AARP* identified the purpose of the ADA and GINA as preventing employers from discriminating against individuals with disabilities as well as preventing discrimination based on genetic information.[119] If the concern meant to be addressed by the EEOC's regulations is that of employees being "coerced" into participating in employer wellness programs, resulting in disclosure of protected medical

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[114] Soldano, *supra* note 95.
[115] *Id.* at 283.
[116] *Id.*
[117] *Id.*
[118] *2013/2014 Staying@Work U.S. Executive Summary,* TOWERSWATSON (2013), https://www.towerwatson.com/en/Insights/IC-Types/Survey-Research-Results/2013/09/2013-2-14-stayingatwork-us-executive-summary-report (last visited Jan. 16, 2018).
[119] AARP v. EEOC, 267 F.Supp.3d 14, 29-30 (D.D.C. 2017).

information which could be used in a discriminatory way, one possible solution is to require the person in charge of the wellness program to be independent of and disinterested in the company. This may be a desirable result, as it is clear that both employers and employees benefit from such programs. Also, if the party who reviews the medical information associated with such program is independent, this will reduce the risk that such information could provide the basis for discrimination by the employer. Furthermore, this measure could alleviate individuals' concerns of misuse of their health information.

Indeed, according to a Kaiser study, 47 percent of the total population of Americans said "they are either 'very' or 'somewhat' concerned that an unauthorized person might get access to their confidential records and information."[120] This concern is further exacerbated when the health conditions could "trigger social stigma (including perceived blame for having the condition) and discrimination."[121] For example, conditions such as "mental health disorders, alcohol and substance abuse disorders, HIV and other sexually transmitted diseases, and diabetes[,]" are stigmatized conditions.[122] Thus, employers can increase employee confidence in such programs by clearly stating the types of medical information that will be acquired, who will have access, and how disclosure is restricted.

While such a requirement may impose an additional cost on employers with respect to the implementation of corporate wellness programs, they may be willing to implement such programs if the benefits exceed the costs. Given the abundant benefits of such programs, it may still be in a company's best interest to move forward and implement corporate wellness programs.

As a policy matter, encouraging employees to participate in wellness programs benefits all parties. As provided above, employers and employees stand to gain tangible benefits from such arrangements. Thus, a regulation which limits an employer's ability to provide such incentives may be a limitation on a social good. Requiring independence in the administration and implementation of employer wellness programs reconciles the legal issue in *AARP* while preserving the positive benefits from wellness programs.

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[120] Ashley Kirzinger, Elise Sugarman, Bryan Wu, and Mollyan Brodie, *Kasier Health Tracking Poll: August 2016,* KAISER FAMILY FOUND. (Sep. 1, 2016), https://www.kff.org/global-health-policy/poll-finding/kaiser-health-tracking-poll-august-2016/.

[121] Karen Pollitz and Matthew Rae*, Changing Rules for Workplace Wellness Programs: Implications for Sensitive Health Conditions*, KAISER FAMILY FOUND. (Apr. 07, 2017), https://www.kff.org/private-insurance/issue-brief/changing-rules-for-workplace-wellness-programs-implications-for-sensitive-health-conditions/.

[122] *Id.*

Such independent and disinterested individuals could objectively evaluate employee's medical data, and work to improve wellness programs.

This solution may also be preferable to any "arbitrary line-drawing" that would inevitably result from the EEOC's determination of a new regulation governing what level of incentives a company may offer for participation in employer wellness programs. This is particularly true as no matter what the incentive is for participation in wellness programs, low-income employees may still feel pressured to participate in order to realize the benefits of the employee wellness program. By requiring independent and disinterested individuals to review such health data, the EEOC may find a sturdy foundation on which to base their much-needed regulations.

The next issue then becomes, how can this independence be achieved. The paradigm would involve employers designating outside individuals as the persons in charge of implementing and administering employer wellness programs. Employees of the company may be required to be "screened" from any such information, so as to eliminate the possibility of misuse of the information. Although employees may feel compelled to participate in wellness programs for the benefits, there is no risk that the data protected by the ADA & GINA are used to discriminate, and the employers and employees may gain additional benefits, such as productivity and improved health.

One inherent risk is that if such "independent" individuals are being paid by the employer, they may feel beholden to the employer, which could potentially compromise their independence. While it may not be possible to entirely ensure those in charge are one hundred percent disinterested, by separating those who review the medical information and those who make hiring, firing, and promotion decisions, the risk is decreased.

In addition, such independence plays prominent roles in other areas of the law. For example, in shareholder derivative actions, corporations may create Special Litigation Committees (SLC's) comprised of "…disinterested and independent directors (SLC) empowered by the board to investigate and determine whether the prosecution of derivative claims is in the best interests of the company..."[123] The Minnesota Supreme Court adopted a deferential standard of review for SLC's, holding that "a court must defer to an SLC's decision to settle a shareholder derivative action if the proponent of that decision demonstrates that (1) the members of the SLC possessed a disinterested independence and (2) the SLC's investigative procedures and

[123] Joseph M. McLaughlin, *Special Litigation Committees in Shareholder Derivative Litigation*, Harvard Law School Forum on Corporate Governance and Financial Regulation, https://corpgov.law.harvard.edu/2010/04/25/special-litigation-committees-in-shareholder-derivative-litigation/.

methodologies were adequate, appropriate, and pursued in good faith."[124] This is but one example of another area of the law where this sort of approach has been utilized. Instead of engaging in a discussion as to what level of an incentive an employer may offer, it may be beneficial to change the approach, to realize the policy benefits while preserving the purposes of the ADA and GINA.

One additional benefit to this proposal is that it provides clarity to employers. In the wake of the *AARP* case, employers may be confused as to what they will be required to do. What happens if the EEOC promulgates a new regulation, and then insurance rates skyrocket again, causing the regulation, which may be reasonable today, to become unreasonable in the future? By simply requiring such information to be maintained by independent and disinterested individuals, this problem would not occur.

One other counterargument is that in health contingent wellness programs, although information is protected by independent and disinterested individuals, employers are actually still entitled to discriminate against those who do not or are not able to achieve a particular health standard. However, as the court in *AARP* noted, the majority of wellness programs are participatory, rather than health-contingent.[125] For example, in modern times, "just 8% of large employers offer health-contingent programs authorized by the ACA and subject to ACA limits on incentives; but nearly three quarters of large employers collect employee health information through wellness programs, and more than half of them provide incentives to employees to participate."[126] Figure one below represents the specific types of wellness programs offered by large employers, as found by Kaiser.

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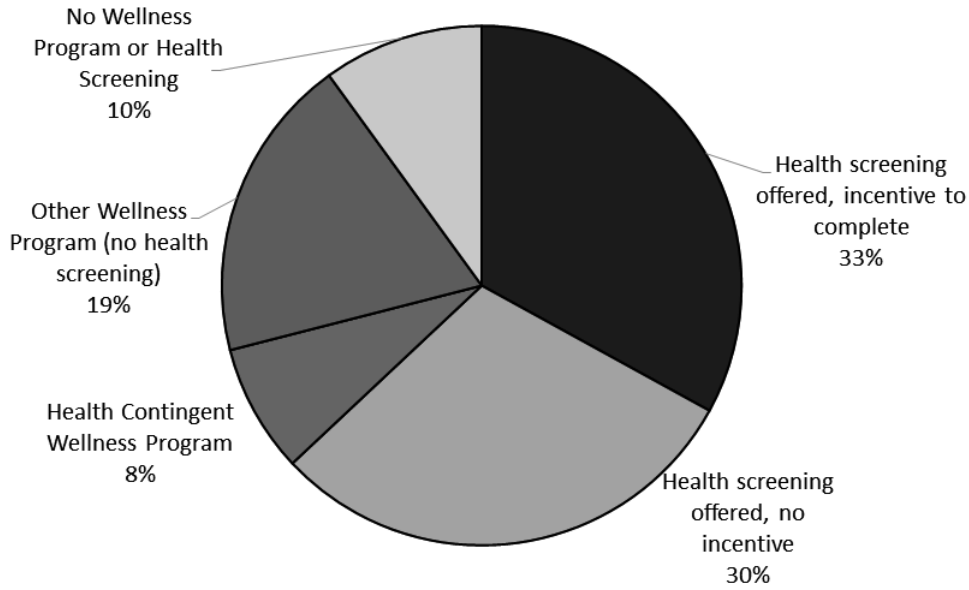
[124] *In re United Health Group Inc. S'holder Derivative Litig.*, 754 N.W.2d 544, 561 (Minn. 2008).
[125] AARP v. United States EEOC, 267 F.Supp.3d 14, 30 (D.D.C. 2017).
[126] Kathy L. Hudson and Karen Pollitz, *Undermining Genetic Privacy? Employee Wellness Programs and the Law*, NEW ENG. J. OF MED. (Jul. 6, 2017) http://www.nejm.org/doi/full/10.1056/NEJMp1705283?af=R&rss=currentIssue&#t=article.

Figure 1

Types of Wellness Programs Offered by Large Offering Employers, 2016 [127]



NOTE: Large Employers (200 or More Workers). Health screenings including biometric screening and health risk assessment. Other Wellness Programs include either, smoking cessation programs, weight loss programs – including a dietician or exercise classes or other lifestyle or behavioral coaching such as health education classes or substance abuse counseling.
SOURCE: Kaiser/HRET Survey of Employer-Sponsored Health Benefits, 2016.

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While this solution may address the problem of discrimination based on the protected health information, the EEOC might understandably be concerned with the fact that under wellness programs, employees might be effectively "forced" to participate, to receive the benefits (i.e. the discount of the cost of health coverage), irrespective of discrimination concerns. As previously stated, such benefits have a significant impact on the cost of health coverage, and thus, while not actually forced to participate, employees might "effectively" be forced to participate. However, this note is limited to the discrimination concerns related to voluntary participation.

As previously mentioned, the EEOC may also consider reducing the permissible incentive levels with respect to wellness programs. A reduction in the incentive levels would have a few benefits. First, it would reduce the pressure put on employees to participate in such programs, thereby increasing their individual autonomy. However, as noted by the court in *AARP*, there will have to be some "arbitrary line drawing."[128] This is the case

[127] Kaiser/HRET Survey of Employer-Sponsored Health Benefits, 2016.
[128] *AARP*, 267 F.Supp.3d at 34.

because there is no specific level at which point participation in a wellness program becomes "coercive." Rather, it may be argued that the court is looking for a more "reasonable" conclusion by the EEOC. By lowering the percentage to 15-20%, some of the benefits of wellness programs may be conserved while lowering the financial consequences to non-participants.

Another benefit of lowering the permissible incentive levels vis-a-vis independent administration of corporate wellness programs is the risks associated with the former. As stated above, one inherent risk to the proposed independent administration solution is the risk that the administrators will not truly be independent. In other words, administrators may be reluctant to "bite the hand that feeds," and may give information sought by the employer to the employer. On the other hand, by reducing the incentive cap to 15-20%, the reasoning goes, the participation is "voluntary," and therefore the anti-discrimination purposes of the ADA/GINA are not implicated.

One issue with this line of reasoning is that any number picked by the EEOC will be arbitrary. Thus, it is flawed reasoning to suggest that even this reduction would be a reasonable interpretation of "voluntary." One may rightfully question how any "arbitrary line drawing" could ever be a "reasonable interpretation" as required under *Chevron*. Thus, an independent administrator would also avoid this issue.

According to various sources, the EEOC is likely to provide proposed rule changes by mid-2018.[129]

VIII. CONCLUSIONS

In conclusion, by simple extension of HIPAA's coverage, data collected by wearable technology could be provided similar protections as that already covered by HIPPA. With respect to the court's ruling in *AARP v. United States Equal Employment Opportunity Commission*, the EEOC could provide that those responsible for implementing and administering employer wellness programs could be required to be "independent and disinterested." This would allow employers and employees to realize the numerous benefits of employer wellness programs while avoiding coercive disclosure of sensitive medical information which could in turn be used to discriminate against employees.

[129] *See* Braden Campbell, *EEOC Says It Will Float Wellness Rule Update By Mid-2018*, LAW360 (Sep. 22, 2017), https://www.law360.com/articles/966915/eeoc-says-it-will-float-wellness-rule-update-by-mid-2018.